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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 695

MINNIE WHITEFOOT, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY BRIEF BY PETITIONER

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Petitioner conceives that her duty at this stage of the case is to show that this is an important one and that her position has merit; she believes that now is not the time to prove she will prevail if the Court hear the case on the merits.

1. Is the case important? The brief of the United States in opposition is revealing in what it does not discuss. The Department of Justice does not explain

why the United States was so frightened of the possibility that petitioner might here prevail that the Department required an indemnity of $15,019,640 from the Confederated Tribes and Bands of Yakima Indians before the Department would permit even a portion of such fund to be paid to the Confederated Tribes and Bands.

The petitioner's contention is so meritorious that the Congress required 29 different utilities to compensate individual Indians for their holdings in tribal property when held according to the respective tribes' laws, usages and customs. If such a holding were a legal impossibility, then the Congress would have done a useless act—the individual Indians could still not recover.

Finally, the United States does not deny this is a test case.

2. Is there merit in petitioner's statement that she is suing for a "recognized" right? Without belaboring the thought, the rationale is: Finding No. 6 (293 F. 2d 666) of the Court below finds that prior to the treaty of 1855, the individual families had this custom of exclusive and inheritable right of possession in tribal areas upon which petitioner is relying. Then the great treaty of 1855 (12 Stat. 951) "secured" their fishing rights. *United States* v. *Winans*, 198 U.S. 371 at 381, makes it clear that a "treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted." As to the reserved rights, whatever once was, still is. Nothing new was created. What was retained continued to exist and was reinforced by "recognition" by the United States.

But the Department of Justice adopts a novel thought by stating that all of the property was "granted" to a new creature—the Yakima Nation. This disregards the cardinal rule of construction that an Indian treaty will be construed to mean what the Indians thought it meant. *United States* v. *Winans*, 198 U.S. 371, 381. What did the Indians think back in 1855 when their old chiefs "secured" their fishing rights? Whatever they thought in construing the term "secured" is what this Court should adopt as its own. Centuries of conduct, both before and after the great treaty of 1855, is a strong indication that this custom was and is the law of the Confederated Tribes and Bands.

The treaty provision is: "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said Confederated Tribes and Bands of Indians, *as also* the right of taking fish at all usual and accustomed places * * *." (Emphasis supplied)

To whom was "recognition" given by the phrase in the treaty "as also the right of taking fish at all usual and accustomed places?" Can this Court say that this provision was interpreted by the Indians to relate back to the preceding phrase "The exclusive right of taking fish in all streams where running through or bordering said reservation is further secured to said Confederated Tribes and Bands of Indians?"

We submit that even a lawyer, trained to parse sentences, must closely examine this paragraph to see if the off-reservation fishing rights were being reserved only by the Confederated Tribes and Bands and to see if ownership were denied to the previous owners, the families. Can we by interpreting this paragraph legal-

istically assert beyond peradventure that the Indian chiefs back in 1855 understood that only the new creature "the Yakima Nation" had security in the old accustomed fishing places? To adopt such a reasoning we would have to disregard the law of the Confederated Tribes and Bands of the people. By their conduct, the people have interpreted the treaty provision to mean that within the tribal areas the families have had "secured" to them their fishing rights.

"The foregoing analysis is but another illustration of the tenacity that people cling to their old laws, which is so well enunciated by *Strother* v. *Lucas*, 12 Pet. 410, 437 (1838):

> "Every country has a common law of usage and custom, both local and general, to which the people, especially those of a conquered or ceded one, cling with more tenacity than to their written laws; and all sovereigns respect them."

We submit that even if tested by the standards of white men the old Indian chiefs negotiated with the United States back in 1855 within the framework of their culture and laws. If the Court accepts petitioners' analysis, then these fishing rights were "secured" to the respective families in accordance with their ancient laws. Petitioner's rights are thereby "recognized" by the United States and she is therefore entitled to the protection of the Fifth Amendment.

The Solicitor General seems to concede in footnote 1 of his brief, page 4, that treaties can be construed to refer to personal rights because the Solicitor General there states:

> "Treaties with Indian tribes and nations are *usually* construed as referring only to tribal rights." (Emphasis supplied)

If it be not axiomatic that all treaties "recognize" only tribal rights, then some treaties can ripen individual rights into compensable rights.

We ask merely that the treaty be construed in accordance with our time honored rules of construction. There is sufficient substance in the argument for petitioner that one cannot with implacibility assert that everything was reserved to the tribe and therefore petitioner's claim is meritless. Certainly the reasoning of the Court below is inadequate to support a conclusion of law that everything was reserved to the tribe because, instead of applying the usual criteria and instead of ascertaining the meaning of the treaty or ascertaining what the Indians thought it meant, the Court below stated that Indian property in general is communal and therefore this must also be.

An examination of the cases cited by the Solicitor General in footnote 1 reveals that in each one of them the Court had to prove that the property therein involved was communal.' The Court found that the facts relating to the respective tribes there involved led to the conclusion of law that their property was communal. For example, in the Cherokee cases its constitution expressly provided that its lands were the "common property" of the tribe (Cherokee Trust Funds, 117 U.S. 288), which distinguishes it from the instant case.

The attitude of the Department of Justice before the Commissioner and the Court below has been flat-footedly to state "North American Indians were communal people, and their customs and laws did not recognize any system of private land ownership. This is fundamental." The Solicitor General has been more

circumspect and has merely said that such is usually the case. But at all levels the Department of Justice, who represents the United States when the latter appears as guardian of Indians and Indian tribes, has failed to analyze the treaty in accordance with our time-honored rules of construction. Perhaps this is an additional reason for granting certiorari. It is time that the proper criteria be spelled out—that tribal property may or may not be communal, depending upon its particular laws and customs.

Wherefore, petitioner prays that her case be considered important and meritorious and that a full review be granted by the issuance of a writ of certiorari to the Court below.

Respectfully,

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